HAVASU HEIGHTS RANCH AND DEVELOPMENT CORP. ET AL.

IBLA 86-357 Decided November 13, 1986

Appeal from a decision of the Arizona State Director, Bureau of Land Management, dismissing a protest to private exchange A-18968 and sustaining notice of realty action.

Set aside and remanded.

1. Exchanges of Land: Generally--Private Exchanges: Public Interest

   Sec. 206(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(a) (1982), authorizes the Secretary of the Interior to exchange public lands or any interests therein if the public interest will be well served by such exchange.

2. Exchanges of Land: Generally--Private Exchanges: Generally--Segregation

   Although regulation 43 CFR 2201.1(b) provides that publication of a notice of realty action on an exchange proposal may segregate the public lands covered by the notice to the extent that they will not be subject to appropriation under the public land laws, including the mining laws, such segregation does not preclude BLM from considering during the pendency of the proposal a second exchange proposal, subsequently filed, that involves virtually the same selected public lands.

3. Exchanges of Land: Generally--Private Exchanges: Protests

   Sec. 207 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1717 (1982), provides that no tract of land may be disposed of under the Act, whether by sale, exchange, or donation, to any person who is not a citizen of the United States, or in the case of a corporation, is not subject to the laws of any State or of the United States.

4. Exchanges of Land: Generally--Private Exchanges: Equal Values

> Sec. 206(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(b) (1982), states that the values of lands exchanged by the Secretary under the Act either shall be equal, or if not equal, should be equalized by the payment of money to the grantor or to the Secretary as the circumstances require so long as payment does not exceed 25 per centum of the total value of the lands or interests transferred out of Federal ownership.

APPEARANCES: Robert E. Klemm, President, Havasu Heights Ranch and Development Corp., Fort Wayne, Indiana, for appellant; G. J. Doell, pro se; Fritz L. Goreham, Esq., Office of the Field Solicitor, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Havasu Heights Ranch and Development Corporation (Havasu) and G. J. Doell (Doell) appeal from a decision of the Arizona State Director, Bureau of Land Management (BLM), dated January 7, 1986, dismissing a protest to private exchange proposal A-18968 and sustaining a notice of realty action (NORA) published at 50 FR 38214 (Sept. 20, 1985). Exchange proposal A-18968 involves the conveyance by the United States of 741.30 acres of public land, including parts of secs. 20 and 32, T. 20 N., R. 21 W., Gila and Salt River Meridian, to a trust in exchange for 12,393.0 acres of private lands. The NORA at issue states that the instant exchange is made pursuant to section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982).

Appellants protest exchange proposal A-18968 because they seek to obtain virtually the identical lands 1/ in secs. 20 and 32 as part of an exchange that they proposed to BLM on March 11, 1985. Appellants charge that BLM wrongly held this land to be unavailable for exchange at the time of appellants' proposal. Lands offered by appellants are in a prime wildlife habitat for bighorn sheep and their acquisition, appellants contend, would be in the best interests of BLM and, particularly, the Yuma District.

In answer to this protest, the State Director notes appellants had been informed by letters of June 7, August 8, and October 16, 1985, that

1/ The public lands sought by appellants are described as the S 1/2 sec. 20 and the N 1/2 sec. 32, T. 20 N., R. 21 W., and total 640 acres. The proponent of exchange proposal A-18968 seeks these same lands, less 2-1/2 acres in sec. 20 apparently occupied by a water facility. Exchange proposal A-18968 also involves lots 2, 4, 7, and 9 in sec. 31, T. 19 N., R. 21 W., (103.8 acres) for a total selection of 741.3 acres. Appellants seek no additional acreage than the 640 acres first described above.

their exchange was not acceptable because the subject lands were being exchanged with another party. The State Director also found that the protested exchange well served the public interest and that BLM stood ready to consider other exchanges that would benefit its bighorn sheep program.

[1] Section 206(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1716(a) (1982), authorizes the exchange of land in these terms:

> A tract of public land or interests therein may be disposed of by exchange by the Secretary under this Act * * * where the Secretary * * * determines that the public interest will be well served by making that exchange: Provided, That when considering public interest the Secretary shall give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife and the Secretary finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired.

Regulations implementing this statute appear at 43 CFR Part 2200. Of particular applicability to this appeal is regulation 43 CFR 2201.2(e), which provides for multiple exchange proposals:

> (e) Where 2 or more exchange proposals are submitted covering the same public lands, in whole or in part, the authorized officer shall review the proposals and advise the exchange proponents as to the acceptance or nonacceptance of their proposals in the same manner as specified in paragraphs (b) through (d) of this section. 2/

Although it appears from the protest response that the State Director considered the appropriate standard, i.e., the public interest, in evaluating the protested exchange, the response also reveals that appellants' proposal did not receive full and fair consideration from BLM. BLM's citation to correspondence of June 7, August 8, and October 16, 1985, makes clear that it rejected appellants' proposal because it had completed or was in the final stages of completing exchange proposal A-18968. 3/ Implicit in BLM's correspondence appears to be the notion that an exchange proposal segregates the

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2/ Paragraphs (b) through (d) state, inter alia, that an acceptable exchange proposal may be the basis for a NORA; provide that the proponent of an exchange proposal not accepted by BLM shall be so advised in writing and permitted to file a protest with the State Director; and require the State Director to review such proposal to determine if it is in accordance with BLM policies, programs, and regulations.

3/ BLM wrote to appellant Doell on June 7, 1985, stating:

"The exchange proposal you made for the S 1/2 of sec. 20, T. 20 N., R. 21 W., and N 1/2 of sec. 32, T. 20 N., R. 21 W., is no longer viable as the

selected public land so as to prevent consideration of a subsequently filed proposal.

[2] A segregation of the selected public land may be effected by publication of a NORA describing such lands, 43 CFR 2201.2(b), but any such segregation does not preclude BLM from considering subsequently filed exchange proposals. The NORA at issue stated: "Publication of this Notice will segregate the subject lands from all appropriations under the public land laws, including the mining laws, but not the mineral leasing laws." 50 FR at 38215. 4/ This statement is not inconsistent with regulation 43 CFR 2201.1(b), which states in part:

> The publication of the notice of realty action on an exchange proposal in the Federal Register may segregate the public lands covered by the notice of realty action to the extent that they will not be subject to appropriation under the public land laws, including the mining laws. Any subsequently tendered application, allowance of which is discretionary, shall not be accepted, shall not be considered as filed, and shall be returned to the applicant, if the notice segregates the lands from the use applied for in the application.

To hold, however, that this NORA precluded consideration of subsequent exchange proposals would place regulation 43 CFR 2201.2(e) in conflict with regulation 43 CFR 2201.1(b) and prior case law.

Regulation 43 CFR 2201.2(e) clearly contemplates that multiple exchange proposals may involve the same selected public lands, but does not suggest

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fn. 3 (continued)
the Kingman Resource Area office consummated the exchange that was discussed with you during your February 1985 visit to the Havasu Resource Area office."

On August 8, 1985, BLM wrote:

"In [our June 7, 1985,] letter it was explained the BLM land which you were interested in acquiring near Bullhead City was not available for exchange for the Aubrey Hills property because another private exchange involving that property had already been consummated. We had previously informed you of the existence of this other private exchange and had expressed the likelihood that this land would not be available for exchange to your clients."

Finally on October 16, 1985, BLM stated to Robert E. Klemm, president of Havasu:

"The Kingman Resource Area is now in closing stages of the paperwork. The Notice of Realty Action has been issued and is in its final days. Thus, these parcels are no longer available. * * * With this in mind, BLM is in no position to offer [secs. 20 and 32] for exchange to you and your clients."

4/ A NORA published at 49 FR 23703 (June 7, 1984) explains why a segregation occurs: "This action is necessary to avoid the occurrence of nuisance mining claims that could encumber the public lands while the preparation of an environmental assessment is ongoing." This NORA, published months prior to appellants' exchange proposal, contained essentially the same language regarding segregation as that quoted in the text above.

that upon the publication of a NORA for an acceptable proposal, BLM may not consider subsequently filed proposals. Instead, BLM is to review such proposals and advise the proponents of their acceptance or nonacceptance. Such practice is in harmony with prior decisions of this Department. In Owen Ault, A-27845 (Mar. 30, 1959), for example, the Department accepted the exchange proposal of a party whose proposal was acknowledged by the Department to have been filed after Ault's. See also Sidney D. Moeur, A-25548, A-25570 (Nov. 9, 1949), and Bond v. Harvey, A-24527 (Feb. 24, 1947) (dicta).

Where, as here, BLM's final NORA is published some six months after receipt of another exchange proposal, BLM is bound by 43 CFR 2201.2(e) to consider the merits of such exchange and not simply reject it out of hand. If either of the proposals is not acceptable to BLM, the proponent of the proposal "shall be so advised in writing with a statement of the reason(s) for the non-acceptance and advised of the availability of a protest to the State Director." 43 CFR 2201.2(c). We hereby direct BLM to re-examine appellants' proposal and determine whether it or exchange A-18968 better serves the public interest. See Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1946). BLM's decision of January 7, 1986, is, accordingly, set aside.

[3] In setting aside the decision of January 7, 1986, we offer no suggestion as to which proposal better serves the public interest. We note, however, appellants' argument in their statement of reasons that exchange A-18968 violates section 207 of FLPMA, 43 U.S.C. § 1717 (1982). 5/ That section provides:

> No tract of land may be disposed of under this Act, whether by sale, exchange, or donation, to any person who is not a citizen of the United States, or in the case of a corporation, is not subject to the laws of any State or of the United States.

In response to this contention, BLM has responded:

> Presently, the "offered lands" are in trust 6/ and some of the beneficial owners are not American citizens 7/ and as correctly pointed out by the Protestant, the trust is not a qualified conveyee. BLM is aware of this requirement and the exchange will not be consummated 8/ until the necessary steps of transfer are taken to qualify the proponent as a qualified conveyee.

Answer at 4.

5/ This issue was raised for the first time on appeal. Appellants risk having arguments of merit rejected for consideration by this Board by failing to assert such arguments before BLM. Henry A. Alker, 62 IBLA 211 (1982).

6/ The trust is denoted "Trust 2123," and its trustee is Stewart Title & Trust of Phoenix, Inc. (Stewart), a Delaware corporation. Agent for the trust is Gordon Bell Realty & Development Corporation of Scottsdale, Arizona.

7/ Many of the trust beneficiaries appear to reside in France and Holland.

8/ BLM appears to contradict its correspondence of June 7 and Aug. 8, 1985, in which it states that exchange A-18968 has already been consummated. See n.3 supra.

[4] Appellants point to yet another detail BLM acknowledges to be lacking in exchange proposal A-18968. According to appellants, lands selected by the trust in exchange A-18968 are valued at $767,000, while lands offered by the trust to the United States are valued at $735,000. A deficiency of $32,000 must be absorbed by the United States as the exchange now stands, appellants contend, and such deficiency violates section 206(b) of FLPMA, 43 U.S.C. § 1716(b) (1982). That section states in part: "The values of the lands exchanged by the Secretary under this Act * * * either shall be equal, or if they are not equal, the values shall be equalized by the payment of money to the grantor or to the Secretary * * * as the circumstances require." BLM's response to this charge is: "Any deficiency as to the values of the 'offered lands' and the 'selected lands' will be resolved before the final consummation of the exchange. This is a requirement under the law and it will be adhered to." Answer at 6.

The record is hereby remanded to the Arizona State Director to consider the arguments set forth in appellants' statement of reasons when determining whether appellants' exchange proposal or proposal A-18968 better serves the public interest. n9 Consistent with 43 CFR 2201.2(d), the State Director shall issue a decision appealable to this Board setting forth with particularity the reasons for preferring one exchange over the other. If appellants' proposal is again rejected, the State Director's decision shall respond directly to the arguments set out in appellants' statement of reasons. Any future NORA shall correctly identify the parties to the exchange, inter alia. 43 CFR 2200.1(c).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Director is set aside and remanded for action consistent herewith.

John H. Kelly
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

R. W. Mullen
Administrative Judge

9/ Of course, if the State Director should find that because of changed circumstances neither proposal serves the public interest, he may reject each proposal.